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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

Bill Jones
DEPUTY ATTORNEY GENERAL

In re:)	1999 OAL Determination No. 19
Request for Regulatory)	
Determination filed by D.)	[Docket No. 98-003]
RICHARDSON regarding)	
Administrative Bulletin)	August 12, 1999
Number 98/05, concerning the)	
structured punishment work)	Determination Pursuant to
detail pilot program of the)	Government Code Section
DEPARTMENT OF)	11340.5; Title 1, California
CORRECTIONS ¹)	Code of Regulations,
)	Chapter 1, Article 3
)	

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
CRAIG S. TARPENNING, Senior Counsel
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes that portions of the departmental directive concerning the structured punishment work detail pilot program are a restatement of a regulation contained in the California Code of Regulations, which provision is exempt from the Administrative Procedure Act. The Office of Administrative Law further concludes that the remaining portions of the departmental directive *supplementing* the pilot program regulation are "regulations," except for those provisions which (1) are merely statements of fact or motivation or (2) restatements of other existing law.

8

DECISION^{2,3,4}

The Office of Administrative Law ("OAL") has been requested to determine whether Administrative Bulletin Number 98/05 ("AB 98/05") issued by the Department of Corrections ("Department") contains "regulations" which must be adopted pursuant to the Administrative Procedure Act ("APA").⁵ By letter dated March 16, 1999, entitled "Comments on Active Consideration," the requester also specifically objected to certain elements of AB 98/05 as being inconsistent with existing regulations and "... violative of the equal protection clause of the state and federal constitution."

OAL concludes that:

- (1) Some portions of AB 98/05 are restatements of existing section 3999.1.4 of title 15 of the California Code of Regulations or are merely statements of fact or motivation; and
- (2) Other portions of AB 98/05 are "regulations" which are invalid unless adopted pursuant to the APA.

DISCUSSION

D. Richardson is an inmate at the California State Prison, Folsom. On May 6, 1998, he requested OAL to determine whether the rules enumerated in AB 98/05 are invalid since they were not adopted in compliance with the APA. Mr. Richardson also contends that some of these rules are inconsistent with existing regulations and are "... violative of the equal protection clause of the state and federal constitution."

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT OF CORRECTIONS?

Government Code section 11000 states:

"As used in this title [Title 2. "Government of the State of California" (which title encompasses the APA)], 'state agency' includes every state office, officer, department, division, bureau, board, and commission."

The APA narrows the definition of “state agency” from that in Section 11000 by specifically excluding “an agency in the judicial or legislative departments of the state government.”⁶ The Department is in neither the judicial nor legislative branch of state government. There is no specific statutory exemption which would generally permit the Department to conduct rulemaking without complying with the APA.

Penal Code section 5058, subdivision (a), declares in part that:

“The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]. . . .* [Emphasis added.]”

Clearly, the APA generally applies to the Department's quasi-legislative enactments. However, effective January 1, 1995,⁷ Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements in subdivisions (c)⁸ and (d). The exemption contained in subdivision (d)(1) will be discussed below in part III.A. of this determination.

II. DO THE CHALLENGED RULES CONSTITUTE “REGULATIONS” WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision of Government Code section 11342, subdivision (g), defines “regulation” as:

“. . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]”

Government Code section 11340.5, authorizing OAL to determine whether agency rules are “regulations” and thus subject to APA adoption requirements, provides in part:

“(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [“]regulation[”] as defined in subdivision

(g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]”

In *Grier v. Kizer*,⁹ the California Court of Appeal upheld OAL's two-part test¹⁰ as to whether a challenged agency rule is a “regulation” as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a “regulation” and subject to the APA. In applying the two-part test, OAL is guided by the *Grier* court:

“ . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]”¹¹

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in “a statutory scheme which the Legislature has [already] established. . . .”¹² But “to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . .”¹³

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations (“CCR”) provisions) cannot legally be “embellished upon” in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)¹⁴ held that a terse 24-word definition of “intermediate physician service” in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went “far beyond” the text of the duly adopted regulation.¹⁵ Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

“... the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . . [Emphasis added.]”¹⁶

A. DO THE CHALLENGED RULES CONSTITUTE “STANDARDS OF GENERAL APPLICATION?”

For an agency rule or standard to be “of general application” within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.¹⁷

AB 98/05 establishes and implements the California Department of Corrections’ Structured Punishment Work Detail Pilot Program (“SPWDPP”). The SPWDPP is intended to reduce the rate of inmates returning to prison as parole violators by requiring these inmates to participate in a program of intense manual labor assignments, without pay, and with limited privileges. AB 98/05 establishes placement criteria, program requirements, and sanctions for refusing to work. It applies statewide to all members of a class and is thus a standard of general application.

Having concluded that the challenged rules are standards of general application, OAL must consider whether the challenged rules meet the second prong of the two-part test.

B. DO THE CHALLENGED RULES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT OR GOVERN THE DEPARTMENT'S PROCEDURE?

Penal Code section 5054 declares that

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]"

Subdivision (d) of Penal Code section 5058 provides that the Director of the Department of Corrections or the Director's designee may adopt regulations applying to any legislatively mandated or authorized pilot program or a departmentally authorized pilot program.

AB 98/05 prescribes rules for the placement of inmates in the SPWDPP, establishes the minimum labor requirements, and provides sanctions for inmates who refuse to work.

OAL concludes that the challenged rules implement, interpret, and make specific Penal Code section 5054.

III. DO THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY RECOGNIZED EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.¹⁸ In *United Systems of Arkansas v. Stamison* (1998),¹⁹ the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

"When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section

16487 [‘The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.’]; Gov. Code, section 18211 [‘Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act’]; Labor Code, section 1185 [orders of Industrial Welfare Commission ‘expressly exempted’ from the APA].) [Emphasis added.]”²⁰

Express statutory APA exemptions may be divided into two categories: special and general.²¹ *Special* express statutory exemptions typically: (1) apply only to a portion of one agency’s “regulations” and (2) are found in that agency’s enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of a *special* express exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an *general* express exemption is Government Code section 11342, subdivision (g), part of which exempts “internal management” regulations of all state agencies from the APA.

A. DO THE CHALLENGED RULES FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?

The Department states in its response that AB 98/05 is exempt from the requirements of the APA pursuant to subdivision (d) of Penal Code section 5058.²² Subdivision (d) of Penal Code section 5058 provides in part:

“The following regulations are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified:

- (1) Regulations adopted by the director or the director’s designee applying to any legislatively mandated or authorized pilot program or a departmentally authorized pilot program, provided that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986, and that the following conditions are met:
 - (A) A pilot program affecting male inmates only shall affect no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates only shall affect no more

than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates shall affect no more than 10 percent of the total state inmate population.

- (B) The director certifies in writing that the regulations apply to a pilot program that qualifies for exemption under this subdivision.
- (C) The certification and regulations are filed with the Office of Administrative Law and the regulations are made available to the public by publication pursuant to subparagraph (F) of paragraph (2) of subdivision (b) of Section 6 of Title 1 of the California Code of Regulations.

The regulations shall become effective immediately upon filing with the Secretary of State and shall lapse by operation of law two years after the date of the director's certification unless formally adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code."

The Department states that AB 98/05 was adopted by the Director as a pilot program regulation pursuant to subdivision (d) of Penal Code section 5058, and was in effect at the time Mr. Richardson filed his request for determination.

"On January 29, 1998, the Chief Deputy Director certified that the Structured Punishment Work Detail Program regulations were exempt from the APA under PC Section 5058 (d). . . . The regulations for the pilot program were filed with the Office of Administrative Law (OAL) on February 2, 1998. . . . The OAL subsequently approved and filed the regulations with the Secretary of State on February 9, 1998. . . ." ²³

This is essentially the case. The Department submitted a regulation to OAL as a pilot program for the SPWD pursuant to subdivision (d)(1) of Penal Code section 5058 on February 3, 1998. As submitted, this regulation was exempt from the requirements of the APA and from much of OAL's review pursuant to subdivision (d)(1) of Penal Code section 5058. On February 9, 1998, OAL filed this regulation with the Secretary of State as new section 3999.1.4 of title 15 of the California Code of Regulations ("CCR"). New section 3999.1.4 became effective immediately on February 9, 1998 when filed with the Secretary of State and will remain in effect until January 29, 2000 (two years from the date of the certification

by the Director of the Department pursuant to subdivision (d)(1) of Penal Code section 5058).²⁴ AB 98/05 has a date of issuance indicated as March 10, 1998. The request by Mr. Richardson was submitted to OAL on May 6, 1998. Therefore, at the time of issuance of AB 98/05 and of the request by Mr. Richardson, section 3999.1.4 was in fact a provision in title 15 of the CCR duly adopted pursuant to subdivision (d)(1) of Penal Code section 5058. The Department stated in its response that:

“The Department contends that the Structured Punishment Work Detail Pilot Program is exempt from the mandates of the APA pursuant to PC section 5058(d) and therefore requests that the relief sought by Inmate Richardson be denied.”²⁵

This statement is not entirely accurate. The SPWDPP itself is not exempt from the requirements of the APA. Subdivisions (d) and (d)(1) Penal Code section 5058 provide:

“(d) The following *regulations* are exempt from Chapter 3.5 (commencing with Section 11340 of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified:

(1) *Regulations* adopted by the director or the director’s designee applying to any legislatively mandated or authorized pilot program or a departmentally authorized pilot program. . . .” (Emphasis added.)

Therefore, only those provisions implementing the SPWDPP *contained in section 3999.1.4 of title 15 of the CCR* as submitted to OAL by the Department are exempt pursuant to subdivision (d)(1) of Penal Code section 5058. Additional regulatory provisions implementing the SPWDPP not contained in section 3999.1.4 are not exempt unless also submitted to OAL and filed with the Secretary of State pursuant to subdivision (d)(1) of Penal Code section 5058. Of course, the Department may also adopt revisions to sections 3999.1.4 or new provisions implementing the SPWDPP by way of a rulemaking proceeding conducted pursuant to the APA. If time is of the essence, the Director can also adopt emergency regulations by certifying that the operational needs of the Department require adoption of the regulation on an emergency basis pursuant to subdivision (e) of Penal Code section 5058

OAL recognizes that to the extent provisions in AB 98/05 merely restate provisions contained in section 3999.1.4 of title 15 of the CCR, no new regulatory provisions have been created. In 1989 OAL Determination No. 15, OAL stated:

“In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and ‘its application.’ Such an enactment is simply ‘administrative’ in nature, rather than ‘quasi-judicial’ or ‘quasi-legislative.’ If however, the agency makes new law, i.e., supplements or ‘interprets’ a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power.”²⁶

Citing an earlier OAL determination, OAL went on to explain:

“If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only *one* legally tenable ‘interpretation,’ that rule is not quasi-legislative in nature--no new ‘law’ is created.”²⁷ [Emphasis added.]

The issue is whether AB 98/05 merely restates provisions contained in section 3999.1.4 of title 15 of the California Code of Regulations. In some cases, the answer is “yes.” For example, the fourth sentence under “Pilot Program Requirements” in AB 98/05 provides:

“If inmates have to be endorsed to another institution during this incarceration period, they will be endorsed to another SPWD participating institution providing specific case factors allow for movement to a SPWD institution.”

Subsection (d) of section 3999.1.4 of title 15 of the California Code of Regulations provides:

“If during the current incarceration period the inmate has to be assigned to another institution/facility, they shall be assigned to another SPWD Program participating institution/facility provided that specific case factors allow for such movement.”

In his letter of March 16, 1999, entitled “Comments on Active Consideration,” the requester raised objections to certain elements of AB 98/05. The requester objected to the fact that inmates who have been designated for participation in the program are treated differently from other inmates in that they are required to undergo intense manual labor without pay and with limited privileges.²⁸ He may be referring to the fifth sentence in the “Background” portion of AB 98/05 which provides:

“The CDC established a plan to reduce the number of repeat parole violators by requiring the inmates to participate in a program of intense manual labor assignments, without pay and with limited privileges.”

However, the part of the provision objected to appears to be a restatement of the third sentence in the introductory paragraph of section 3999.1.4 of title 15 of the California Code of Regulations:

“These inmates shall be required to perform work or projects that require strenuous, manual labor, without pay, and with limited privileges.”

In his letter dated March 16, 1999, the requester also objected to participants being “. . . maintained on ‘C’ status, even though they are working in a full-time job assignment.”²⁹ AB 98/05 provides in the second sentence in the first paragraph under “Initial Classification Committee” that:

“Inmates who meet the criteria for participation in the SPWD Program shall immediately be placed in Privilege Group C and shall remain in Privilege Group C whether they are in a full duty assignment, a limited duty assignment, or on a waiting list.”

This provision is a restatement of the second sentence of subsection (e) of section 3999.1.4 of title 15 which provides:

“Inmates that meet the criteria for participation shall immediately be placed in Privilege Group C and shall remain in Privilege Group C whether they are in full duty assignment, a limited duty assignment, or on a waiting list.”

In his letter dated March 16, 1999, the requester also objected to the creation of a new status for inmates: “A1/C.”³⁰ AB 98/05 provides in the second sentence under “Full work crew participation” on page 4:

“Inmates assigned to the SPWD work crew are placed in Work Group A-1 by the IAO and Privilege Group C by the CC-I.”

Except for the words “by the IAO” and “by the CC-I”, this provision is a restatement of the first sentence in section (i)(1) of section 3999.1.4 of title 15 which provides:

“Inmates assigned to the SPWD work crew are placed in Work Group A-1 and Privilege Group C.”

In his letter of March 16, 1999, the requester also objected to inmates precluded from participation because of a medical condition being “. . . placed on non-participation work duty (NPWD) waiting list, and designated ‘C’ status limitation by their CC-I.”³¹ AB 98/05 provides on page 4:

“Nonparticipation - Inmates who have documented restrictions or limitations that preclude them from meeting the essential functions of the SPWD assignment shall be placed on the Nonparticipation Work Duty (NPWD) waiting list. Inmates on the NPWD waiting list shall be placed in Work Group A-1 by the IAO and Privilege Group C by the CC-I.”

Except to the extent AB 98/05 requires that the restrictions be “documented” and that inmates be placed in the work group “by the IAO” and the privilege group “by the CC-I”, this provision is a restatement of subsection (i)(3) of section 3999.1.4 of title 15 which provides:

“Nonparticipation: Inmates who have restrictions or limitations that preclude them from meeting the essential functions of their SPWD assignment shall be placed on the Nonparticipation Work Duty (NPWD) waiting list. Inmates on the NPWD waiting list shall be placed in Work Group A-1 and Privilege Group C.”

Lastly, the requester in his letter of March 16, 1999 objected as follows:

“When a [sic] inmate refuses to participate, his refusal will be documented on a CDC Form 115, for violation of CCR, Title 15, §3040(a). The SPWD reports infractions as defined in Title 15, but it deviates from the regulations as it relates to privilege group ‘C’, and work category A1. This deviation has not undergone the Administrative Procedures [sic] Act (APA) process. Which violates state law.”

The first sentence of the second paragraph under “Initial Classification Committee” on page 3 of AB 98/05 provides:

“Inmates refusing to participate in the SPWD Program during Initial Classification Committee shall be issued a CDC Form 115, Rules Violation Report, for violation of CCR Section 3315 (a)(3)(J) and BPT Form 1135-A,

In-Custody Misconduct Report, shall be prepared for the inmate's referral to the Board of Prison Terms (BPT) for a revocation extension screening."

This is merely a restatement of subsection (f) of section 3999.1.4 of title 15 which provides:

"Inmates refusing to participate in this program during Initial Classification Committee shall be issued a CDC Form 115, Rules Violation Report, for violation of California Code of Regulations (CCR), Title 15, Section 3315(a)(3)(J). In addition, a Board of Prison Terms (BPT) Form 1135-A, In Custody Misconduct Report, shall be prepared for the inmate's referral to the BPT for a revocation extension screening."

All of the provisions in AB 98/05 which the requester specifically objected to in his letter of March 16, 1999 are largely restatements of provisions contained in section 3999.1.4 of title 15 of the CCR. However, the above-cited provisions in AB 98/05 are not the only instances of provisions in AB 98/05 which merely repeat or restate existing law. Other provisions contained in AB 98/05 which are merely restatements of provisions contained in section 3999.1.4 of title 15 are as follows:

- on page 1, "Pilot Program Requirements," the first and second sentences, third sentence except for "placed in this program are informed they;"
- on page 2, "Placement Criteria," both sentences;
- on pages 3 and 4, "Initial Classification Committee", the first sentence in the first paragraph, the second, fourth, fifth, sixth and seventh sentences of the second paragraph; "Full work crew participation", the first sentence, the third sentence except for "by the IAO" and "by the CC-I"; "Limited work crew participation", the first sentence, the fourth and fifth sentences except for "by the IAO" and "by the CC-I"; "Punishment term hold", all except for "by the IAO", and "by the CC-I",
- on page 5, "Unassigned Refusal (UNR)" all except for "by the IAO" and "by the CC-I"; "IAO", the last sentence (in parenthesis) of the first paragraph, the first sentence of the second paragraph;
- on page 6, "SPWD Work Crew," the second and fifth sentences of the first paragraph, the first six words of the fourth sentence of the first paragraph, the

second sentence of the second paragraph, the first sentence of the third paragraph; “Time Keeping,” the last sentence of the first paragraph;

- on page 7, “Inclement Weather,” the first sentence; and “Limited Privilege Group C”, the entire sentence.

Although the provisions in AB 98/05 described above are restatements of existing provisions contained in section 3999.1.4 of title 15 of the CCR, AB 98/05 is a much more extensive document than section 3999.1.4. Although the first two paragraphs on the first page of AB 98/05 entitled “Purpose” and “Background” appear to be merely statements of fact or motivation and are not “regulatory” in nature, many other provisions contained in AB 98/05 are not so easily discounted. Some provisions contained in AB 98/05 go further than corresponding provisions contained in section 3999.1.4 of title 15. For example, subsection (c)(2) of section 3999.1.4 provides:

“Inmates initially placed into this program *may* continue to be placed into this program for each subsequent return-to-custody commitment.” (Emphasis added.)

However, the sixth sentence under “Pilot Program Requirements” on page 1 of AB 98/05 provides:

“... it is the intent of the program that inmates initially placed in SPWD *shall* continue in this program for each subsequent return to custody.” (Emphasis added.)

Other provisions are simply not covered in section 3999.1.4 of title 15. For example, following the above-cited sixth sentence under “Pilot Program Requirements” on page 1, AB 98/05 provides:

“The Work Incentive Structured Prison Environment (WISPE) staff shall have complete oversight of the pilot program to ensure consistency and compliance. The strenuous, manual labor jobs (i.e., manually building paths or walkways, manufacturing masonry products from clay, removing concrete and asphalt) shall be mutually defined by both the institution and WISPE staff. The initial establishment of the pilot program shall be at Calipatria State Prison for Level IV inmates, Pleasant Valley State Prison for Level III inmates, and Folsom State Prison for Level II inmates.”

The language contained in AB 98/05 which is not a restatement of section 3999.1.4 of title 15 of the CCR or of another provision of law is subject to the APA.

B. DO THE CHALLENGED RULES FALL WITHIN ANY *GENERAL* EXPRESS APA EXEMPTION?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.³² Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.³³

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.* [Emphasis added.]"

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*' [Fn. omitted.]" . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of

serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][³⁴]

“Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

“By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . .”³⁵

However, as the *Grier* Court found: “. . . the definition of regulation is broad, as contrasted with the scope of the internal management exception, which is narrow.”³⁶ Internal management policies are those designed to govern the internal operations of the Department. The exception does not apply to “. . . the rules necessary to properly consider the interests of all . . . under the . . . statutes . . .”³⁷ The Department has not contended in its response to this request for determination that any provisions contained in AB 98/05 are exempt as “internal management.” It would appear that few, if any, of the provisions in AB 98/05 meet the requirements for this exemption. The provisions contained in AB 98/05 almost invariably affect the interests of the inmates affected by this program.

Lastly, OAL notes that in his letter dated March 16, 1999, entitled “Comments on Active Consideration,” Mr. Richardson also contends the challenged rules are inconsistent with existing regulations and are “. . . violative of the equal protection clause of the state and federal constitution.” OAL's authority here does not extend to determining whether the challenged rules are consistent with existing regulations or are constitutional. OAL's authority is limited to determining whether an uncodified state agency rule has been issued in violation of Government Code section 11340.5.³⁸ However, it should be noted that the Department has indicated in its response that it is “. . . in the process of promulgating regulations to permanently incorporate the elements of the pilot program into Title 15 of the CCR.”³⁹ OAL

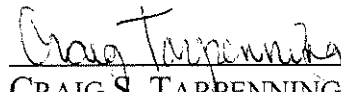
does not know whether all the provisions in AB 98/05 are included in this rulemaking or whether just those present in existing section 3999.1.4 of title 15 are included. However, when this rulemaking is submitted to OAL, OAL will consider all comments submitted to the Department during the public comment period and will review the proposed regulations for compliance with the six statutory criteria of Government Code section 11349.1. One of these criteria is "consistency."

CONCLUSION

For the reasons set forth above, OAL finds that portions of AB 98/05 are restatements of provisions contained in an APA-exempt pilot program regulation contained in the CCR and that other provisions of AB 98/05 are "regulations" which are invalid unless adopted pursuant to the APA.

DATE: August 12, 1999


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ENDNOTES

1. This Request for Determination was filed by D. Richardson, C-94833, Folsom State Prison 2-B5-23, P.O. Box 715071, Represa, CA 95671-5071. The agency's response was submitted by Pamela L. Smith-Steward, Deputy Director of the Legal Affairs Division, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 485-0495.
2. This determination may be cited as **"1999 OAL Determination No. 19."**

Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

Government Code section 11340.5, subdivision (d), provides that:

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an unmodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
4. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA. [Emphasis added.]"

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that unmodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the *Administrative Procedure Act*." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

6. Government Code section 11342, subdivision (a).
7. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules," see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
8. Penal Code section 5058, subdivision (c), codified case law regarding the local rule exception.
9. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment*

Foundation v. Quackenbush (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

10. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, . . . slip op’n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*].”

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

11. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 412, review denied.
12. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
13. *Id.*
14. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
15. *Id.*
16. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
17. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
18. Government Code section 11346.
19. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
20. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.

21. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).
22. Agency response, p.2.
23. Agency response, p.2.
24. Agency response, p.2.
25. Agency response, p.2.
26. 1989 OAL Determination No. 15, CRNR 89, No. 42-Z, October 20, 1989 at p. 3031.
27. 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.
28. Comments on Active Consideration, p. 2.
29. Comments on Active Consideration, p. 2.
30. Comments on Active Consideration, p. 2.
31. Comments on Active Consideration, p. 2.
32. Government Code section 11346.
33. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)
 - c. Rules that “[establish] or [fix], *rates, prices, or tariffs.*” (Gov. Code, sec. 11343, subd. (a)(1); emphasis added.)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342. subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously

agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.

34. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
35. (1990) 219 Cal.App.3d 422 436, 268 Cal Rptr. 244, 252-253.
36. *Grier v. Kizer, supra*, 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 251, disapproved on another point, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198.
37. *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 408, 131 Cal.Rptr. 804, 820, quoted in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 3.
38. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations are proposed by the Department under the APA, OAL will review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 & 11349.1.)
39. Agency response, p.2.